Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner states a claim for a physical taking of its property in violation of the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution based upon the U.S. Fish and Wildlife Service having obtained an injunction pursuant to the Endangered Species Act that prohibited Petitioner from harvesting any timber on a 65 acre parcel of its land in order to preserve it as a Northern Spotted Owl habitat and required Petitioners to allow government agents to enter its property to conduct owl surveys?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the Petitioner Boise Cascade Corporation and the Respondent United States of America.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit dismissing its physical taking claim based upon (1) the U.S. Fish and Wildlife Service having obtained an injunction which prohibited Petitioner from harvesting any timber on a 65 acre parcel of its land in order to preserve it as a Northern Spotted Owl habitat, and (2) the district court having required Petitioners to allow government agents to enter its property to conduct owl surveys during the pendency of the injunction.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Federal Circuit (No. 01-5106), entered September 3, 2002 denying Petitioner's combined petition for panel rehearing and for rehearing en banc is reproduced as Appendix A. The Federal Circuit's July 19, 2002 published decision and judgment affirming the Court of Federal Claims' dismissal of Petitioner's claim for a physical taking based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), is reported at 296 F.3d 1339. The unpublished decision of the Court of Federal Claims (No. 99-CV-860), entered April 10, 2001 granting Respondent's motion to dismiss for failure to state a claim and directing entry of judgment against Petitioner is reproduced as Appendix B. The Judgment of the Court of Federal Claims, also entered on April 10, 2001 dismissing Petitioner's complaint is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The Federal Circuit entered its opinion and judgment dismissing Petitioner's complaint on July 19, 2002, *see* 296 F.3d 1339, and denied Petitioner's request for a rehearing on September 3, 2002. (App. A). This Petition is being timely filed within 90 days of the denial of a timely petition for rehearing, which rendered the judgment final. *See* 28 U.S.C.A. § 2101(c); Supreme Court Rule 13.3; *see also Missouri v. Jenkins*, 495 U.S. 33 (1990) (timely petition for rehearing suspends finality of judgment for purposes of determining timeliness of petition for writ of certiorari). The Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1).

Petitioner's physical takings claim based on *Loretto* raises the same issue as the pending Petition for Certiorari in *Seiber v. State of Oregon*, U.S. Supreme Court Docket No. 02-348. This Court has requested that the State of Oregon file a response to the Seibers' Petition. *See* Docket entry for Oct

28, 2002 in Case No. 02-348, Response requested (Due November 27, 2002). Attorneys for Petitioner in this case also represent the Seiber Petitioners in Case No. 02-348.

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings or Just Compensation Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Section 5 of the Endangered Species Act ("ESA"), 16 U.S.C.A. § 1531, *et seq.* authorizes the federal government to acquire private land by eminent domain for the presservation of threatened and endangered species. It provides in part that the Secretary of the Interior "is authorized to acquire by *purchase*, donation, *or otherwise*, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him." 16 U.S.C.A. § 1534(a)(2) (emphasis added).

Section 9 of the ESA prohibits the "take" of listed species. *See* 16 U.S.C.A. § 1538(a)(1). To "take" a species under the ESA "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.A. § 1532(19). Regulations promulgated by the Environmental Protection Agency provide that

> Harm in the definition of "take" in the [ESA] means an act which actually kills or injures wildlife. Such act

> may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The U.S. Fish and Wildlife Service ("FWS") is authorized to issue an Incidental Take Permit ("ITP") for threatened species under Section 10 of the ESA, 16 U.S.C.A. § 1539(a), which provides in part:

> (a) Permits
>
> (1) The Secretary may permit, under such terms and conditions as he shall prescribe—
>
> .....
>
> (B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.
>
> (2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—
>
> (i) the impact which will likely result from such taking;
>
> (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
>
> (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
>
> (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

The enforcement provisions in Section 11 of the ESA provide in part that "[t]he Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof." 16 U.S.C.A. § 1540(e)(6).

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

The Petitioner is the owner of 65 acres of commercial timberlands in Clatsop County, Oregon, 56 acres of which contain large old growth conifer trees that is the preferred

habitat of the Northern Spotted Owl. The spotted owl was listed as a threatened species by the FWS in 1990. Shortly thereafter, the Oregon Department of Forestry ("ODF") adopted an administrative rule based upon a FWS guideline that prohibited harvesting timber within a 70-acre area surrounding a spotted owl nest site. In 1990, a nesting site was identified in the timber, which was occupied by a breeding pair of spotted owls until 1996.

During the 1997 nesting season the ODF found that the female owl had died and the male owl had left the Timber to nest with a new mate approximately 8 miles away. In August 1997, the ODF notified Petitioner that the nest site on its land had been declared abandoned and it was therefore free under Oregon law to harvest the timber. The ODF, however, advised Petitioner to check with the FWS before commencing to harvest the timber to make sure that Petitioner would not be in violation of the ESA. Petitioner, through its counsel, wrote to the FWS indicating that the ODF had declared the nest site to have been abandoned and requesting whether the FWS had any objection to Petitioner harvesting the timber. *See* Letter from Phillip D. Chadsey to Russell Peterson, Regional Director, FWS (October 20, 1997), reproduced as Appendix D. In reply, the Office of the Solicitor of the Department of the Interior advised Petitioner that it believed a "take" risk still existed because other owls might decide to nest there, and suggested that Petitioner apply for an ITP under Section 10 of the ESA. *See* Letter from Steven Siegel, Attorney, U.S. Department of the Interior to Phillip D. Chadsey (October 30, 1997), reproduced as Appendix E.

Since the ODF had found that the spotted owls were no longer using the timber and the ESA does not require a landowner to obtain an ITP before harvesting timber, Petitioner brought an action in the U.S. District Court for the District of Oregon seeking a declaration that the site had been abandoned. *See* Complaint in ***Boise Cascade Corporation v.***

Michael J. Spear, Regional Director for U.S. Fish & Wildlife Service, U.S.D.C. Or. Case No. 97-1810 JO (Jan. 22, 1998) ("*Boise Cascade 1998*"), reproduced as Appendix F. The FWS filed a counterclaim alleging that it considered the nest site to still be occupied and seeking to enjoin Petitioner from harvesting the Timber unless it obtained an ITP for the owls. *See* Federal Defendants' Answer to Plaintiff's Counterclaim in *Boise Cascade 1998*, reproduced as Appendix G. The district court initially granted the FWS a preliminary injunction to cover the 1998 nesting season. In addition, Petitioner was required to allow the FWS to go onto its property to search for spotted owls. *See* Letter from the Honorable Robert E. Jones to counsel in *Boise Cascade 1998* (May 1, 1998), reproduced as Appendix H. On October 15, 1998 the district court entered a "Decree and Judgment" granting the FWS a permanent injunction barring Petitioner from harvesting any timber on its land unless it obtained an ITP. The court also dismissed Petitioner's claim for declaratory relief and for an injunction against the FWS. *See* Decree and Judgment in *Boise Cascade 1998* (entered October 15, 1998), reproduced as Appendix I.

Petitioner then prepared a Habitat Conservation Plan ("HCP"), and submitted it to the FWS along with an application for an ITP for any spotted owls in its timber. In the HCP, Petitioner agreed to comply with all Oregon wildlife conservation laws, if the FWS approved the ITP. According to the FWS Habitat Conservation Planning Handbook, it should take less than three months to process a "low-effect HCP," *i.e.*, one that involves "relatively few acres of habitat" and where the impact on a list species is "minor or negligible." *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook (1996) at 1-9 and 1-14 (37a-38a), excerpts reproduced as Appendix J. According to the FWS, 7.5 million acres of federal forestlands were already being protected as primary habitat for the spotted owl, which is less than half of

the available habitat on federal forestlands. *See* U.S. Department of the Interior, *Recovery Plan for Northern Spotted Owl—DRAFT* (April 1992) at ix (42a-43a), excerpts reproduced as Appendix K. No private lands were designated by the FWS as a "critical habitat" for the spotted owl pursuant to 16 U.S.C.A. § 1533(a)-(b).

The first step in processing an ITP application requires the government to publish notification in the Federal Register in order to give the public 30 days in which to comment on the HCP. 16 U.S.C.A. § 1539(c); (*See also* App. J at 1-7; 37a.). When the FWS failed to publish notice after Petitioner requested it do so in a timely manner, Petitioner brought a mandamus action seeking a writ to require the FWS to act on its ITP application. *See* Complaint in *Boise Cascade Corporation v. Russell D. Peterson, State Supervisor for U.S. Fish & Wildlife Service*, U.S.D.C. Or. Case No. 98-1538-JO (Dec. 10, 1998), reproduced as Appendix L. At a hearing on February 5, 1999, the district court ordered the FWS to act on the permit application by September 1999. 296 F.3d at 1342. In May 1999 a juvenile owl that had been living in the area was found dead. *Id.* Then on July 30, 1999 the FWS sent Petitioner a letter stating:

> Based on our review of all the information concerning this site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property. Therefore, an Endangered Species Act incidental take permit is no longer required.

On August 17, 1999 the district court lifted the injunction. *See id.*

On October 6, 1999 Petitioner filed this action in the Court of Federal Claims seeking compensation for a "temporary taking of merchantable timber, which it was prevented from logging" due to the injunction of the district court. 296 F.3d

at 1342. One of the theories that Petitioner advanced was that there had been a *per se* physical taking of its land because (1) the injunction required it to submit to a government-authorized physical occupation of its timber and prohibited Petitioner from taking any action to exclude the owls from its property, including any logging, and (2) Petitioner was required by the district court to permit government agents to enter its land and conduct owl surveys for several months as part of the injunction. *Id.* at 1342-43.

The government moved to dismiss Petitioner's complaint, and specifically the *Loretto* claim, on the ground that there had been no forced government occupation resulting in a physical taking. *Id.* at 1343. Petitioner cross-moved for summary judgment on its takings claims. On April 10, 2001, the Court of Federal Claims granted the government's motion, denied Petitioner's cross-motion, and entered judgment in favor of the United States. (Apps. B-C.)

Petitioner then appealed to the Federal Circuit, which affirmed, entering its decision and judgment on July 19, 2002, *see* 296 F.3d 1339, and denied Petitioner's combined petition for panel rehearing and for rehearing en banc on September 3, 2002. (App. A.)

REASONS FOR GRANTING THE PETITION

The decision below was rendered by the United States Court of Appeals for the Federal Circuit. *See* 296 F.3d at 1342. Grounds for review exist where a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(c). Grounds for review also exist where a United States court of appeals has entered a decision in conflict with the decisions of other federal courts of appeals and state

courts of last resort on the same important federal issue. Supreme Court Rule 10(a). All of the above grounds for review are present here.

A. This Case Involves an Important Constitutional Question That Should Be Resolved by This Court.

The Federal Circuit's decision is part of a growing number of cases arising out of state and federal laws and regulations that require property owners to leave their land in its natural condition so it can be occupied as wildlife habitat and, at the same time, deny the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving navigational servitude). These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983).

Here, the federal government specifically chose not to acquire any interest in Petitioner's property through eminent domain, even though it is was authorized to do so by Section 5 of the ESA. 16 U.S.C.A. § 1534. Instead, the FWS imposed a servitude upon Petitioner's timberland by obtaining an injunction against Petitioner in district court which prohibited Petitioner from logging any part of the 65 acre parcel at issue in order to preserve it as a wildlife refuge for spotted owls. In addition, at the request of the FWS the district court authorized a physical incursion when it compelled Petitioner as part of the injunction to provide government surveyors with access to its land to search for owls. The government should not be allowed to avoid paying just compensation for physical takings merely because it chooses to use the court system to appropriate those property rights, rather than exercising its power of eminent domain.

1. *Under a Physical Taking Theory the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control Over It.*

a. A Physical Taking Is at Issue Here.

There is a bright-line test that distinguishes the applicability of a physical taking analysis from that of a regulatory taking. As this Court recently explained in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), a two-pronged inquiry determines whether a physical taking is at issue: (1) does the government claim "any right to use the property" for its own purposes, and (2) does it affect the landowner's right to exclude others? *Id.* at 1479 n.19. If the answer to both of these questions is "yes," then the case must be analyzed as a physical taking. *Id.* By contrast, a "regulatory taking" does not give the government "any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.*

A physical taking analysis applies in this case. In obtaining the permanent injunction against Petitioner (*see* App. I), the FWS both claimed the right to use Petitioner's property for a spotted owl nesting habitat, and prevented Petitioner from engaging in any action to exclude the owls from its property, because to do so would have required "taking" them within the meaning of the injunction and the ESA. (*Id.*); 16 U.S.C.A. §§ 1532(19), 1538(a)(1); 50 C.F.R. § 17.3.

b. The Government's Ability to Control Wildlife Is Not Relevant.

In dismissing Petitioner's physical taking claim, the Federal Circuit relied upon a 1999 opinion by the Oregon Court of Appeals involving the same issue, which held that the landowner could not state a claim for a physical taking because "[t]he state has no control over where spotted owls

choose to nest." *Boise Cascade Corp. v. State ex rel. Oregon State Bd. of Forestry*, 991 P.2d 563, 570 (Or. Ct. App. 1999), *review denied*, 18 P.3d 1099 (Or. 2000), *cert. denied*, 532 U.S. 923 (2001) ("*Boise Cascade 1999*"). *See also* 296 F.3d at 1354-55 (adopting the *Boise Cascade 1999* reasoning). The Oregon state court in *Boise Cascade 1999* improperly shifted the focus of this Court's physical taking jurisprudence from the issue of whether there has been a forced, government-authorized occupation to whether government has control over the occupant, which this Court has never deemed to be the determining factor. *Loretto*, 458 U.S. at 432 n.9; *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992).

In a physical taking case, the key issue is whether the government has *authorized* the *occupation* of private land by a third-party, and has *denied* the landowner the *right to exclude* the government-authorized occupant. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 432 n.9 ("physical occupation authorized by state law is a taking without regard to whether the State, or instead *a party authorized by the State*, is the occupant") (emphasis added). The test is not whether the government controls wildlife. Government had no control over the occupants in either *Kaiser Aetna* or *Loretto*. In *Kaiser Aetna*, the occupants were the boating public, while in *Loretto* the occupant was an inanimate object that was controlled by a third party. The test is whether government has *required* the landowner to *acquiesce* to an occupation of its property for a public purpose. As this Court explained in *Yee*:

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." . . . Thus whether the government floods a landowner's property, [*Pumpelly*], *or does no more than require the landowner to suffer the installation of a cable*, [*Loretto*],

> the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

503 U.S. at 527 (citations omitted; first emphasis in original; second emphasis added).

2. *Numerous Courts Have Refused to Compensate Landowners for the Imposition of a Wildlife Servitude.*

Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases arising out of government requiring private landowners to subordinate the use of their property to a dominant use of it by the government to protect wildlife. In addition to the Federal Circuit and Oregon state and federal courts, numerous courts in other jurisdictions have also refused to find a taking and award compensation. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (government does not "control the conduct" of wildlife species) *cert. denied*, 490 U.S. 1114 (1989) (*see* dissenting opinion of Justice White); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. Dist. Ct. App.) (landowner can use its property "in any way that would not disturb the eagles' natural habitat"),[1] *review denied*, 645 So. 2d 452 (Fla. 1994). Relying in part on *Christy*, in *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338, 345 (Cal. Ct. App. 1993), a California Court of Appeal rejected a physical takings claim involving the spotted owl and other wildlife species whose habitat was protected by state law. Although the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), it omitted any discussion of

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[1] *See* William K. Jones, Charles Evans Hughes Professor of Law at Columbia University, criticism of the *Flotilla* decision, describing it as a "classic" example of a physical taking. *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 61-62 (1995).

the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. 26 Cal. Rptr. 2d 338, n.*; No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994). The court apparently wished to avoid issuing a written opinion addressing a physical taking claim where the protection of a wildlife habitat was at issue.

3. *Courts Are Refusing to Apply the Physical Taking Analysis to Government-Authorized Occupations by Wildlife.*

Like several courts that have addressed this issue, the Federal Circuit incorrectly applied a regulatory taking rather than a physical taking analysis. This Court should grant review and clarify which branch of its takings jurisprudence applies when a landowner is forced to acquiesce to a government-authorized occupation of its land by wildlife and prevented from engaging in any activities to exclude such wildlife.

The Federal Circuit characterizes the injunction as constituting nothing more than a temporary "restriction on private use" of Petitioner's land:

> The ESA itself precludes Boise from harassing, harming, pursuing, wounding, or killing spotted owls, 16 U.S.C. §§ 1532(19), 1538(a)(1) (2000). Boise lost whatever right it had to "exclude" the owls nesting on its land when they were listed as a threatened species under the ESA. The injunction, therefore, did not take whatever remained of this putative property interest; it merely prevented Boise from logging its land without a permit, which—as a regulation imposed upon Boise's use of the property—is a restriction on private use of the land and not a per se taking by the government.

296 F.3d at 1354.

This error is typical of courts that deny compensation for the imposition of a wildlife servitude. The Federal Circuit's application of a regulatory taking standard flows from an erroneous assumption that government authorization of the physical occupation by wildlife is irrelevant. It is grounded upon a supposition contrary to fact—that neither the government, nor any government-authorized third-party, is occupying the land.

The permanent injunction obtained by the FWS went beyond merely regulating the use of Petitioner's land; it required that the timber on it be left standing for the sole purpose of providing a spotted owl habitat. Furthermore, the injunction required Petitioner to give federal agents unfettered access to its land to search for owls. Petitioner was prohibited from excluding any owls and from excluding federal agents looking for owls. The injunction clearly required Petitioner to acquiesce to the use of its private property for a public purpose. *Yee*, 503 U.S. at 522-23, 527.

In *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992), the Second Circuit held that there had been no taking because the landowner could exclude from its property deer that the state sought to protect and also could log "the entire 44 acres of critical softwood in the deeryard." By contrast, Petitioner was prevented by the injunction from harvesting its timber or otherwise excluding any owls from its property. Nor did Petitioner have the option of excluding government surveyors. The sum and substance of the FWS's permanent injunction exerted as much control over Petitioner's property as if the government had acquired a formal easement. *Cf. North Dakota*, 460 U.S. 300 (waterfowl nesting site easements purchased by the federal government under the Migratory Bird Conservation Act, 16 U.S.C.A. § 715, *et seq.*).

In addition, unlike regulatory takings cases, there was no potential "'reciprocity of advantage'" in this case, since Peti-

tioner gained nothing from the restriction on its right to harvest the subject timber, while other owners in the area were free to harvest theirs. *Tahoe-Sierra*, 122 S. Ct. at 1479 n. 19 (citation omitted). Petitioner paid taxes on its land while it was simultaneously prevented from logging and barred from deriving any income from the timber crop. The injunction singled Petitioner out to bear a burden that was not imposed upon many of its neighbors who own commercial timberlands. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Tahoe-Sierra*, 122 S. Ct. at 1488-89. Spotted owls require mature or old-growth timber for nesting sites. (*See* App. K at 19; 49a-51a.) Many of Petitioner's neighbors, including the federal government, have harvested much, if not all of their mature timber in the area, and are now harvesting replacement crops of trees before they reach maturity in order to avoid having them become spotted owl habitat.[2] As one scholar has pointed out, "only latecomers bear the cost of protecting listed species, even though, from a broader perspective, it is the early developers who brought the species to near extinction in the first place." Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, 93 (1997). Professor Karkkainen goes on to state: "The costs are heavily concentrated on a relatively small number of individuals that compose a distinct subgroup of a much larger beneficiary class." *Id.* at 95.

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[2] The federal government owns 31,358,000 acres of land in the State of Oregon, or 50% of the total acreage. Atlas of Oregon, page 84 (University of Oregon, 2d ed. 2001). The United States Forest Service manages 15,643,000 acres (25%) of timberlands and the Bureau of Land Management ("BLM") manages another 15,715,000 acres (25%) of timber and non-timber land in Oregon. *Id.* Under the Department of Interior's Recovery Plan, the FWS ended up protecting as critical habitat on federal lands 7.5 million acres, or a little less than half (48%) of the total acreage available as spotted owl roosting and foraging habitat on federal lands. (App. K at ix; 42a-43a.) The FWS did not designate any private lands as critical habitat for the owls. (*Id.* at 4; 45a-47a.)

As another scholar explained: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reciprocity of advantage, the ESA burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

4. *Failure to Provide Just Compensation Is Creating Perverse Incentives Contrary to the Interests of Wildlife and the Public.*

By failing to provide compensation to those owners who do have spotted owl nesting habitat, government is encouraging other owners of private timberlands to manage their timber so that trees are harvested earlier, before they can become a suitable spotted owl nesting habitat. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 45 (1993-94). Otherwise, as in this case, an occupation by owls will render their timber without any commercial value. The government's short-sighted policy serves neither the best interests of the owls, nor those of landowners whose timber is appropriated for owl habitat.

Nor is this issue limited to the Northern Spotted Owl. It is common knowledge today that the owner of a potential ESA wildlife habitat has every incentive to harvest or otherwise develop the land as quickly as possible before an invading animal is authorized by government to occupy the land for as long as it likes, and any actual or planned commercial use of the property is brought to a screeching halt. If private landowners knew they would be compensated by the public when private land is used for such a public purpose, the incentive to use the saw-blade or bulldozer as soon as possible could be abated, to everyone's best interests.

In another case involving spotted owls and the ESA, where the definition of "taking" rather than property rights was at issue, Justice Scalia prophetically wrote: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). To protect themselves from the unfairness of the present judicial reluctance to provide compensation for wildlife servitudes, landowners will conduct their operations as rational economic actors in a manner that may threaten the very purpose of the ESA itself—to preserve endangered species and their habitats. Eliminating both the unfairness of refusing just compensation and the incentive to develop and harvest sooner rather than later is not only the right thing to do; it is consistent with a logical development of this Court's takings jurisprudence to give full effect to the intent and purpose of environmental protection legislation. As Justice Holmes admonished in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922): "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

B. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

1. *The Federal Circuit's Decision Is Contrary to This Court's Physical Taking Jurisprudence*

The Federal Circuit's refusal in this case to apply a physical taking analysis was contrary to the basic takings jurisprudence of this Court as established in *Tahoe-Sierra*,

Loretto, *Yee*, and *Kaiser Aetna*.[3] The test is not government control over wildlife, but whether government has required acquiescence to the occupation of private land for a public purpose. *Yee*, 503 US at 527.

Petitioner had no choice but to permit spotted owls to nest on its property while the injunction was in effect. It had no choice but to permit FWS agents to search its property for owls. Furthermore, the injunction expressly prohibited Petitioner from conducting any activities on its land that might "take" the owls within the meaning of the ESA, including habitat modification through logging. A *de facto* easement was imposed by the government through the injunction which imposed a servitude upon the subject timberland to provide a wildlife habitat for spotted owls. This was clearly a physical taking.

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[3] The Federal Circuit's holding that only *permanent* physical occupations are compensable, was also inconsistent with this Court's precedents. As explained in *Tahoe-Sierra*:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, *even though that use is temporary*. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946).

122 S. Ct. at 1478-79 (emphasis added). *See also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (forced temporary occupation by floodwater); *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (temporary incursions by military planes of air space over private land).

2. *Lower Federal and State Courts Are Split on This Important Federal Issue.*

There is a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim based on a physical taking theory. The better-reasoned cases focus on whether the property owners have the right to exclude protected wildlife from their land. If not, the forced occupation imposes a wildlife servitude. *Southview Assocs.*, 980 F.2d 84; *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, . . . it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for a wildlife refuge); *Moerman v. State*, 21 Cal. Rptr. 2d 329, 333-34 (Cal. Ct. App. 1993) (holding that there was no taking under *Loretto* because the landowner had the right to exclude elk from his property).[4]

These cases conflict with the Federal Circuit's decision and many others, such as *Boise Cascade 1999*, which avoid an exclusion analysis and hold that there can be no physical taking based upon having to submit to an occupation by wildlife, because government has no control over wildlife.

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[4] The decision of the United States Court of Federal Claims in this case is also inconsistent with its holding in another case that the federal government was liable for a physical taking under the ESA for private water rights appropriated to protect endangered fish species. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-19 (2001).

See e.g., Christy, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So.2d 761; *Sierra Club*, 26 Cal. Rptr. 2d 338.

3. *The Protection of Public Funds Motivates the Trend Toward Erroneous Application of a Regulatory Taking Analysis.*

This Court recently explained that a physical taking is "typically obvious and undisputed" and should be "easily identified." *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17, 1479. While physical appropriations of private property for a public purpose may be obvious to landowners, as the foregoing cases indicate, they are not always easily identified by the lower courts and all too often they are disputed by the government through a long and expensive litigation process. *Id.* at 1478 n.17; *e.g. Tulare Lake*, 49 Fed. Cl. at 318; *Boise Cascade 1999*, 991 P.2d at 570; *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (1990), *aff'd*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687, 698 (1999) (which, although tried as a regulatory taking claim, in part involved habitat for the endangered Smith's Blue Butterfly). By arguing that such cases should be analyzed as a regulatory taking rather than as a physical taking, government stands a much better chance of avoiding liability for having made use of a landowner's property for a public purpose.

The government's argument for a regulatory taking analysis is that its need to protect threatened or endangered wildlife habitat trumps almost any limitation imposed on the owner's productive use of the property.[5] *Tulare Lake*, 49

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[5] "FWS personnel recognize that property owners will have difficulty getting to court prior to exhausting the HCP process and assume that the government will withstand takings challenges if it permits a landowner at least some use of his property." Barton H. Thompson Jr., *The Endangered Species Act: A Case Study In Takings & Incentives*, 49 Stan. L. Rev. 305, 336 (1997).

Fed. Cl. at 318-19. From the government's standpoint, the property owner's investment-backed expectations, compared to the need to protect endangered or threatened wildlife, are irrelevant. To many in government, such wildlife, like historic sites, must be protected at all costs; however, because those costs may be more than most taxpayers are willing to bear, it is often the government's position, supported by some in the academic community, that they should be borne by the landowner and not the public.[6] *Id.*; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138-42 (1978) (Rehnquist, J., dissenting).

Courts are well aware of the impact that takings cases can have on the public treasury and have not been hesitant to seek ways to avoid this Court's takings jurisprudence. *See* Justices Scalia and O'Connor dissenting from a denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994).

There can be no dispute that the FWS's injunction authorized the owls' occupation of Petitioner's land, authorized federal agents to enter Petitioner's land to search for spotted owls, prohibited Petitioner from excluding the owls or the

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[6] In support of this view, a number of academics argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995).

federal agents, and prohibited Petitioner from harvesting its timber and deriving any commercial value from the land. The facts of this case thus fall squarely within the definition of a physical taking. *Tahoe-Sierra*, 122 S. Ct. at 1478-79.

CONCLUSION

Petitioner respectfully urges the Court to grant its Petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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November 27, 2002

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Sept. 3, 2002]

01-5106

BOISE CASCADE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 10, 2002.

FOR THE COURT

/s/ Jan Horbaly
Clerk

Dated: September 3, 2002

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed April 10, 2001]

No. 99-860 L

BOISE CASCADE CORPORATION,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

OPINION

WIESE, *Judge.*

Boise Cascade Corporation (Boise), is the owner of a 65-acre tract of timberland located in Clatsop County, Oregon, known as the Walker Creek Unit. Boise brings this action to recover just compensation under the Fifth Amendment of the United States Constitution for what it alleges was a temporary taking of its property. The claim is grounded on the contention that, because of regulatory action taken by the United States Fish and Wildlife Service (USFWS), it was prevented from logging the property for a period of over eighteen months, and thus was deprived of all productive use of its merchantable timber for that period.

The case is before us now on defendant's motion to dismiss for failure to state a claim upon which relief can be granted and plaintiff's opposition thereto. The matter has been fully briefed and argument was heard on April 3, 2001. We now decide the case in defendant's favor.

FACTS

Background

In a letter dated October 15, 1997, the Oregon Department of Forestry advised Boise that it was removing the restrictions on logging in the Walker Creek Unit that the state had imposed several years earlier to protect what was identified then as the habitat of a threatened wildlife species—the northern spotted owl. The letter explained that because the latest survey of the area had failed either to confirm the presence of a nesting pair of adult spotted owls or to provide evidence of an activity center for a pair of adult spotted owls, the unit "no longer fits the criteria for being designated as a northern spotted owl nesting site" under the standards set forth in the state's administrative rules.

The letter went on to caution, however, that while the unit no longer qualified as a spotted owl nesting site under the Oregon Forest Practices Act, the Department of Forestry was not certain how the unit would be regarded by the U.S. Fish and Wildlife Service under the federal Endangered Species Act.[1] The letter further explained: "Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location."

Mindful of the caution expressed in the Department's letter, Boise decided to invite representatives of the USFWS to visit the Walker Creek Unit to assess whether the unit still

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[1] The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994) was enacted by Congress to provide a program for the conservation of endangered and threatened species and for the conservation of the ecosystems on which such species depend. The Act makes it unlawful to "take" any species of wildlife that is listed as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B).

qualified as protectable habitat for the spotted owl. The conclusion was that it did. Boise was informed of the USFWS survey results in a letter of December 10, 1997, from the Department of the Interior regional solicitor's office:

> Survey protocols peer reviewed by federal and state agencies, as well as scientists, biologists, and managers of private timber companies, recommend documenting that a site is vacant for three years before it is considered unoccupied. The removal of nesting habitat at the Walker Creek site, and the prey base associated with this high quality habitat, would create a risk of harm to the spotted owls which would use this site. The Service recommends that the site continue to be monitored consistent with the protocols if Boise wants to be sure it is unoccupied.

The letter went on to say:

> As indicated to you in previous correspondence, if your client desires certainty in this matter, it is welcome to pursue an HCP [Habitat Conservation Plan] and an incidental take permit under the ESA . . . . Another option might be to pursue a land exchange with the State of Oregon, which we believe may be the best alternative for all involved parties.

Boise decided against pursuing either of the alternatives that the USFWS had proposed.[2] Instead, on December 19, 1997, it filed an action for injunctive and declaratory relief in the United States District Court for the District of Oregon, *Boise Cascade Corp. v. Spear*, No. CV97-1810, asking that

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[2] The permit that is referenced in the quoted text ("incidental take permit") is issued under § 10(a)(1)(B) of the Act. That section authorizes the Secretary to grant a permit for any taking otherwise prohibited by § 9(a)(1)(B) "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). A "habitat conservation plan" is required as part of the permit application process. 50 C.F.R. § 17.22(b)(1) (1999).

court to: (i) declare that "logging of its merchantable timber on its Walker Creek Unit, while no northern spotted owls are actually present or known to be present in the area, would not constitute a 'take' of that specie within the meaning of . . . the ESA [Endangered Species Act]" and (ii) enjoin the USFWS "from taking any action to prevent plaintiff from logging its Walker Creek Unit."

The suit did not succeed. Instead, based on the evidence presented, the court granted the motion of the USFWS (defendant in the action) for a preliminary injunction restraining Boise from conducting any logging operations on the Walker Creek Unit pending the results of a further survey of the property. The basis for the court's ruling was its finding that "irreparable harm is imminent and that a taking of spotted owls in violation of the ESA is likely to occur." *Boise Cascade Corp. v. Spear*, No. CV 97-1810 (D. Or. April 1, 1998) (opinion and order granting preliminary injunction at 17).

The contemplated survey was undertaken and its results were reported to the district court in a status conference convened on September 15, 1998. On October 15, 1998, the court issued a decree and judgment stating that "[o]n the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter." *Boise Cascade Corp. v. Spear*, No. CV 97-1810 (D. Or. Oct. 15, 1998) (decree and judgment at 1). Accordingly, it was ordered that Boise Cascade be "permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA." *Id.* at 2.

A month later, in November 1998, Boise filed an application with the USFWS seeking the issuance of a permit to harvest the timber on the Walker Creek Unit. Accom-

panying the permit application was a habitat conservation plan—a required part of the application—in which Boise explained that the tract was last used as a northern spotted owl nesting site in 1996 and that there were no owls now nesting there that could incidently be taken if the timber were logged prior to March 1, 1999 (the beginning of the next nesting season). The plan acknowledged that the harvesting of the timber could result in an incidental take (resulting from habitat modification) of any owls that might use the property as a nesting site in the future. However, the affected acreage—it was further pointed out—was part of a larger core area that itself was probably insufficient to support the needs of a nesting pair of owls. Accordingly, from Boise's point of view, harvesting of the timber "may not appreciably reduce the likelihood of survival and recovery of the species [the northern spotted owl] in the wild." As required by statute, notice of Boise's application was published in the Federal Register on December 23, 1998; the public was invited to comment.[3]

On February 5, 1999, the matter again came before the district court, this time on plaintiff's application (filed December 10, 1998) for an order directing USFWS's expedited consideration of the logging permit. At the conclusion of the hearing, the court issued a bench ruling allowing the agency until September 1, 1999, in which to complete the permit-evaluation process. After that date—the court explained—it intended to vacate the injunction and permit logging to proceed or, alternatively, direct the payment of compensation.

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[3] Section 10(c) of the Endangered Species Act, 16 U.S.C. § 1539(c) directs the Secretary to "publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application."

On July 30, 1999, Boise was advised of the agency's final determination: "based upon . . . review of all of the information concerning the Walker Creek site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property." Accordingly, the agency concluded, "an incidental take permit under the Endangered Species Act is no longer required."

Plaintiff's Complaint

On October 6, 1999, plaintiff filed a complaint in this court seeking compensation for the temporary taking of its property. The focus of the complaint is the injunction that was issued by the district court enjoining plaintiff from logging its property without first obtaining a permit under the ESA. That injunction, plaintiff contends, "imposed a condition at the request of the USFWS that the ESA did not require."

In keeping with this view of the matter, plaintiff has filed a four-count complaint alleging as follows: (i) a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 488 U.S. 419 (1982) (based on the contention that it was denied the right to exclude the northern spotted owl from its property and, additionally, was required to permit government personnel to enter upon its property); (ii) a categorical taking under *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (based on the contention that it was prevented from logging its property for a period of over eighteen months and thus was deprived of all economically viable use of its property during that time); (iii) an exaction-type taking under *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (based on the contention that the injunction did not substantially advance a legitimate governmental interest under the ESA) and, (iv) a regulatory taking under *Penn Central Transport Co. v. New York City*,

438 U.S. 104 (1978) (based on the contention that it had a reasonable investment-backed expectation that it would be able to log its property without delay).

Defendant's Motion to Dismiss

Defendant has moved for dismissal of the suit for failure to state a claim upon which relief can be granted. The thrust of the motion is that the district court's injunction did no more than prohibit plaintiff from logging without a permit and therefore placed no constraints upon plaintiff's use of its property sufficient to qualify as a taking of that property under any of the alternative theories of Fifth Amendment liability that plaintiff has alleged. Additionally, defendant urges dismissal of Count One of the complaint (the claim of a per se taking based upon an alleged physical invasion) on the further ground that there was no forced governmental intrusion of plaintiff's property; hence, no taking. Plaintiff opposes defendant's motion.[4]

DISCUSSION

It is a settled principle in takings law that a regulatory process that requires a property owner to obtain a permit before proceeding with a particular use of his or her property does not, in itself, effect a taking of the property. As the Supreme Court has explained: "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States v. Riverside*

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[4] In addition to opposing defendant's motion, plaintiff also filed a cross-motion for summary judgment with respect to each of the counts in its complaint. By separate order, this court denied plaintiff's cross-motion for summary judgment (without prejudice to a right of later reinstatement) pending disposition of the threshold legal issues raised in defendant's motion.

Bayview Homes, Inc., 474 U.S. 121, 127 (1985). Defendant's motion to dismiss rests on this principle.

Plaintiff does not challenge the correctness of this principle as a statement of law. It maintains, however, that defendant's reliance is misplaced. Plaintiff points out that the permit process that was considered in *Riverside Bayview Homes, supra*—requiring a land owner to obtain a permit before placing fill material on property over which the Corps of Engineers had asserted regulatory jurisdiction (a wetland)—was part of a mandatory administrative process. Adherence to that process was a condition necessary to obtaining the authority to proceed. Here, by contrast, we are told there is no existing regulatory regime—no mandatory permit process under the ESA. Rather, Boise contends that under the Endangered Species Act a landowner need not obtain a permit before proceeding with the logging of its timberland. To be sure, it concedes, if in the process of logging without a permit a landowner causes the "take" of an endangered species to occur, then civil and criminal penalties could be imposed. But the possibility that such sanctions might be imposed, argues plaintiff, cannot diminish the fact that it need not have obtained a permit in the first instance. Accordingly, it sees the imposition of a permit requirement in this case as an enlargement of the statutory scheme and, simultaneously, as the imposition of a servitude on its property. And because that servitude remained in place for approximately eighteen months, plaintiff claims that there was a temporary taking of its property for which compensation is now owing.

We cannot endorse this argument; it is wrong as a matter of law. The Endangered Species Act makes it unlawful to take any species of fish or wildlife that has been listed as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B). The Act defines the term "take" to mean, *inter alia*, to harm. 16 U.S.C. § 1532(19). Interior Department regulations, in turn, define the term harm to include "significant habitat

modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1999). It was on the basis of this regulation, and the evidence offered in respect to it, that the district court granted a preliminary injunction (later made permanent) restraining Boise from logging without a permit.

Specifically, in its opinion of April 1, 1998, the district court stated:

> Given the testimony of plaintiff's own witnesses, a taking is likely to occur if plaintiff logs the Walker Creek Unit. Plaintiff's expert testified at the hearing that the Walker Creek Unit is the best spotted owl habitat in the area, that it is not uncommon for such owls to leave a nesting site for a year in order to find a new mate, and that there is a "reasonable likelihood" that the male Walker Creek owl will return to nest in the Walker Creek Unit this year. Therefore, if Boise Cascade logs the Walker Creek Unit, it could easily harm the species and thus be liable for a taking under the ESA.

Boise Cascade Corp. v. Spear, No. CV 97-1810 (D. Or. April 1, 1998) (opinion and order granting preliminary injunction at 15-16.)

Given the district court's express finding that a logging of the Walker Creek Unit could easily harm the species and render Boise liable for a taking, it cannot be seriously argued now that the district court's injunction abridged the company's right to proceed without a permit. Rather, what the issuance of the injunction plainly indicates is that plaintiff was under a duty, in the first instance, to have applied for a permit. To have conducted a logging operation without it, would have amounted to a violation of law. We conclude, therefore, that the permit process was an obligatory component of the Endangered Species Act on which no claim

of taking may be based. A permit process that only temporarily curtails the use of private property cannot fairly be characterized as the appropriation of private property to public use. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 204 (1985) (Stevens, J., concurring).

The second argument that we consider is plaintiff's contention that the injunction resulted in a physical taking of its property because it authorized USFWS personnel to enter upon the property for purposes of conducting an owl survey and, additionally, because it barred Boise from prohibiting the occupancy of its property by the northern spotted owl. Plaintiff contends that these instances of "forced occupancy" amounted to a *per se* taking. We disagree.

The conditions that plaintiff describes were incidents of the permitting process that were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself. Limitations on property use of this character, which only temporarily affect the right to exclude, do not make out a takings claim, much less a takings claim alleging physical occupation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-36 (1982).

CONCLUSION

Based on the reasons stated, we allow defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The Clerk is directed to enter judgment dismissing the complaint.

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed Apr. 10, 2001]

No. 99-860 L

BOISE CASCADE CORPORATION,

v.

THE UNITED STATES.

JUDGMENT

Pursuant to the court's opinion, filed April 10, 2001, allowing defendant's motion to dismiss for failure to state a claim upon which relief can be granted,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Margaret M. Earnest
Clerk of Court

By: /s/
Deputy Clerk

April 10, 2001

APPENDIX D

STOEL RIVES LLP
ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet: www.stoel.com

October 20, 1997

Phillip D. Chadsey
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Russell Peterson
Regional Director
U.S. Fish & Wildlife Service
911 NE 11th
Portland, OR 97232

Re: Walker Creek Northern Spotted Owl Site
Clatsop County

Dear Mr. Peterson:

This firm represents Boise Cascade Corporation that owns 65 acres of commercial timberlands in Clatsop County. This is the same land described in Charlie Stone's (from the Oregon Department of Forestry) letter of October 15, 1997 to

Mike Hicks of Boise Cascade, a copy of which was sent to you. A pair of spotted owls has been known to use Boise Cascade's property as a nesting site for at least the past six years. The State in 1993 designated 56 acres of Boise Cascade's property as protected spotted owl habitat under former OAR 629-24-809 (which has been renumbered so that it is now OAR 629-655-0210) and has prevented Boise Cascade from logging it.

As a result Boise Cascade sued the State for the taking of its property under the Just Compensation Clause to the Fifth Amendment to the U.S. Constitution and the similar provision of the Oregon Constitution. Last week the Circuit Court in Clatsop County granted Boise Cascade summary judgment on the issue of liability based on *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992).

As Mr. Stone indicated in his letter to Mr. Hicks, the State now considers the nesting site abandoned because the female has died and the male has moved to another nest site. Therefore, Boise Cascade intends to start logging its timber in the core area within the next few weeks.

If your agency intends to interpose an objection, please have your legal counsel contact me within the next 10 days.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:jss
Enclosure
cc: Mr. Joseph S. Munson

OREGON DEPARTMENT OF FORESTRY
STATE FORESTER'S OFFICE
2600 State Street
Salem, OR 97310
(503) 945-7200
TDD (503) 945-7213
TDD 1-800-437-4490

October 15, 1997

Mike Hicks
Boise Cascade Corporation
450 Pacific Avenue
Monmouth, Oregon 97361

Dear Mike:

Through routine surveying and tracking of northern spotted owls conducted by the Department of Forestry's Lands Management Program, it has recently been determined that the parcel of forestland retained by Boise Cascade Corp. (when it sold off other holdings to Agency Creek on 1991)on Walker Creek, located at SW 1/4 Section 6, T6N, R6W, in Clatsop County, no longer fits the criteria for being designated as a northern spotted owl nesting site as used in OAR 629-655-210 (formerly OAR 629-24-809).

For the purposes of this rule, nesting site means the tree, when known, that contains the nest, or when not known, the activity center, of a *pair of adult spotted owls*. Of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at the Buster Quarry site more than eight miles away. No responses to surveying were registered this past season at the Walker Creek site.

In 1992, Boise Cascade filed notifications and written plans with the department for harvesting at this site. The

written plan for a portion of the tract was denied because it did not adequately address the protection of a 70 acre area of suitable habitat around the nesting site. With the information that we have now regarding the site, if a notification were filed for harvest on this area, there would be no requirement for a written plan under the Forest Practices Act based on the existence of a northern spotted owl nesting site. Of course, any other requirements for written plans, such as operating within 100 feet of a fish-bearing stream, would still apply.

Although this parcel no longer qualifies as a northern spotted owl nesting site under the Oregon Forest Practices Act, I do not know how it will be regarded by the U.S. Fish and Wildlife Service under the Endangered Species Act. Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location. The Department of Forestry will be informing the U.S. Fish and Wildlife Service of our determination by copy of this letter.

Sincerely,

/s/ Charlie Stone
CHARLIE STONE
Forest Practices Director

CHS:na

cc: Members of the Oregon Board of Forestry
James E. Brown, State Forester
Russell Peterson, Regional Director, USFWS
Paula Burgess, Governor's Natural Resources Assistant
William Cloran, Asst. Attorney General
Phillip D. Chadsey, Stoel Rives, LLP

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR

Pacific Northwest Region
500 N. E. Multnomah Street, Suite 607
Portland, Oregon 97232

October 30, 1997

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Fax: (503) 220-2480

RE: Walker Creek northern spotted owl site

Dear Mr. Chadsey:

I am in receipt of your letter of October 20, 1997, to Mr. Russell Peterson regarding the intent of Boise Cascade to harvest timber at the Walker Creek northern spotted owl site in Clatsop County, Oregon. The letter inquires whether the U.S. Fish and Wildlife Service ("Service") intends to object to the proposed timber harvest and requests a response from Service counsel. No information regarding Boise Cascade's past or planned timber harvest activities was included with your letter.

As you may be aware, under the spotted owl survey protocol endorsed by the Service, a spotted owl nest is not considered unoccupied unless owls have not been observed there for three successive years. This is because owls commonly return to nest sites they have previously used or other owls may use a previously occupied site. It appears the Walker Creek site was occupied at least as recently as 1996.

The information you sent does not indicate the circumstances surrounding the death of the Walker Creek female, whether the Walker Creek male continued to use the site, the nature of survey efforts in the area, whether survey efforts will continue in accordance with accepted protocol, or whether other owls are now using the site. It also appears that the proposed harvest includes or is in close proximity to nest trees. Based on the limited information you have provided, there may be a risk of "take" of one or more northern spotted owls if the area is immediately harvested.

Take of threatened species may be authorized through the issuance of an incidental take permit under Section 10 of the Endangered Species Act. Such a permit may be issued on the basis of an approved Habitat Conservation Plan (HCP) which includes appropriate conservation measures for habitat maintenance, enhancement, and protection.

The Service has assisted many parties in preparing HCPs. If Boise Cascade is interested in pursuing an HCP, a company representative should contact Mr. Gary Miller or Mr. Rich Szlemp of the Service's office. Mr. Miller or Mr. Szlemp may be reached at (503) 231-6179. If you would like to discuss this matter, please call me at (503) 231-6298.

For the Regional Solicitor

/s/ Steven Siegel
STEVEN SIEGEL
Attorney
U.S. Department of the Interior

cc: Russell Peterson, FWS
Gary Miller, FWS
Rich Szlemp, FWS

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed Dec. 19, 1997]

Civil No. CV97-1810-JE

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR
FOR U.S. FISH & WILDLIFE SERVICE,
Defendant.

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF—FEDERAL QUESTION JURISDICTION

Jurisdiction

1. This action arises under the laws of the United States including the federal Endangered Species Act of 1973, as amended (the "ESA"), 16 USC § 1531, *et seq.*, and jurisdiction is based on 28 USC § 1331. Plaintiff seeks declaratory relief pursuant to 28 USC § 2201 and injunctive relief pursuant to FRCP 65.

Parties and Venue

2. Plaintiff is a Delaware corporation that is authorized to do business in the state of Oregon. Defendant is the Regional Director of the U.S. Fish and Wildlife Service (the "USF&WS"), whose responsibility it is to enforce the ESA within the state of Oregon. Venue is proper under 28 USC § 1391(b). The USF&WS is an agency of the Department of the Interior under the overall supervision of the Secretary of Interior.

Statement of Facts

3. Plaintiff is the owner of approximately 50 acres of merchantable timber in Clatsop County, Oregon, known as the Walker Creek Unit, that was used by a pair of northern spotted owls (*strix occidentalis caurina*) as a nesting site from 1990 to 1996. Much of the unit, which includes two nest trees, consists of old growth timber. Such timber is overly mature and is starting to decay and rot, causing the volume of merchantable wood to decline. Therefore, any delay in logging these trees will adversely affect their economic value to plaintiff. A severe winter storm could also cause such timber to fall and, in the course of doing so, damage the fallen tree or the adjacent timber and reduce its economic value.

4. In 1990 the USF&WS listed the northern spotted owl as a threatened species under the ESA. As a part of the listing process, the USF&WS was required by the ESA to designate "critical habitat" for the species and the agency was directed to do so in *Northern Spotted Owl v. Lujan*, 758 F Supp 621 (WD Wash 1991).

5. On July 7, 1990, the USF&WS issued "Incidental Take Guidelines" requiring that all property owners avoid harvesting core nesting areas, or "nest site/activity center[s]," which are defined as consisting of not less than 70 acres of suitable habitat used by young owls before the fledgling stage. The Walker Creek Unit is such a "nest site/activity center."

6. On October 2, 1991 the USF&WS rescinded the foregoing "Incidental Take Guidelines" because a federal court found that they had not been lawfully adopted. A copy of those guidelines and the memorandum rescinding them are attached as Exhibit 1. At no time since that date has the USF&WS ever adopted any regulation regarding northern spotted owl habitat that generally restricts or prohibits the

logging of suitable northern spotted owl habitat on private property in the state of Oregon. The only restriction on logging such habitat is where there is an imminent threat of actual injury to northern spotted owls known to be using that habitat. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F3d 781, 784-85 (9th Cir 1995).

7. On January 15, 1992 the USF&WS issued its final rule determining the critical habitat for the northern spotted owl. The agency only designated federally owned lands as critical habitat for the northern spotted owl. The USF&WS did not designate any private lands as critical habitat, and it excluded even those private lands that were physically situated within the boundaries of critical habitat units.

8. The USF&WS did not designate any land within Clatsop County as being critical habitat for the northern spotted owl. Even the federal timberlands within the county have not been so designated.

9. As used in the ESA, to "take" a species "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 USC § 1532(19) (1985). "[H]abitat modification or degradation, standing alone, is not a taking pursuant to section 9" of the ESA. 46 Fed Reg 54,748, 54,750 (1981).

10. Before October 1997, the Oregon Department of Forestry (the "ODF") had prohibited plaintiff from logging the Walker Creek Unit because it contained a northern spotted owl nesting site and was protected under Oregon law. On or about October 15, 1997, the ODF sent plaintiff a letter, a copy of which is attached as Exhibit 2, informing plaintiff that the ODF considered the owls to have abandoned the Walker Creek Unit as a nesting site because they did not use it during the 1997 nesting season. The DOF also advised plaintiff it should consult with the USF&WS before deciding

to log the unit because that agency might consider any significant alteration of owl habitat to be a taking under the ESA.

11. The USF&WS still considers the Walker Creek Unit to be an active nesting site, although the female owl died before the 1997 nesting season and the male owl found a new mate and used a different nesting site during the 1997 nesting season.

12. On October 29, 1997, plaintiff submitted a notification and written plan to the DOF to log its Walker Creek Unit, a copy of which is attached as Exhibit 3. That plan specifically provided:

> "If Northern Spotted Owls (NSO) are found on site, harvesting activities will be conducted outside of NSO nesting periods." (Exhibit 3 at 4.)

The DOF approved that plan, subject to the foregoing condition.

13. Harvesting the Walker Creek Unit poses no possibility that plaintiff's logging operations present an imminent threat to actually killing or injuring the pair of northern spotted owls known to have occupied that site in the past, because the female is dead and the male has moved to another nest site approximately eight miles away to join another female.

14. On December 2, 1997, two representatives of the USF&WS inspected plaintiff's Walker Creek Unit. As a result of that visit, the USF&WS, through its legal counsel, advised plaintiff that "[t]he removal of nesting habitat at the Walker Creek site, and the prey base associated with the high quality habitat, would create a risk of harm to the spotted owls which would use this site." The USF&WS's foregoing use of the word "harm" appears not to be restricted to an imminent threat of actually injuring or killing the owls that were known to have used the nest site in the past, but

apparently seeks to prevent logging suitable nesting habitat even though there are no owls known to be present in the area. That position is contrary to the law as stated by the Ninth Circuit in *Forest Conservation Council*, 50 F3d 781.

15. Taking or harming a northern spotted owl in violation of the ESA is a criminal act and any person violating it is also subject to more severe civil penalties. Thus, plaintiff has no adequate remedy at law.

16. The USF&WS has previously brought lawsuits against private property owners seeking to enjoin them from logging their timber because it was suitable owl habitat, even though that timber was more than a mile from the core area nest site, on the grounds that to harvest the timber would constitute an "incidental take" of the birds under the ESA. A copy of the government's complaint in one such suit is attached hereto as Exhibit 4.

FIRST CLAIM FOR RELIEF

17. Based on the foregoing facts, plaintiff seeks a declaration that plaintiff's logging of its merchantable timber on its Walker Creek Unit, while no northern spotted owls are actually present or known to be present in the area, would not constitute a "take" of that specie within the meaning of 16 USC § 1532(19) or otherwise be in violation of the ESA.

SECOND CLAIM FOR RELIEF

18. Based on the facts alleged in paragraphs 3 through 15, plaintiff seeks an injunction enjoining defendant and the USF&WS from taking any action to prevent plaintiff from logging its Walker Creek Unit and from seeking to enforce any provision of the ESA after plaintiff logs that property.

WHEREFORE, plaintiff prays as follows:

A. For a declaration that logging merchantable timber on private property, while no northern spotted owls are

actually present or known to be present in the area, cannot constitute a "take" within the meaning of the ESA.

B. For an injunction prohibiting defendant and the USF&WS from taking any action to prevent plaintiff from logging its Walker Creek Unit or from subsequently attempting to enforce any provision of the ESA against plaintiff after the property has been logged.

C. For plaintiff's costs and disbursements in this suit.

Dated: December 19, 1997.

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY, OSB No. 66028
Attorneys for Plaintiff

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 97-1810-JO

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR
FOR U.S. FISH & WILDLIFE SERVICE,
Defendant.

FEDERAL DEFENDANTS' ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND COUNTERCLAIM FOR INJUNCTIVE RELIEF

COME NOW federal defendants the United States of America, and MICHAEL J. SPEAR, in his official capacity as Regional Director of the United States Fish and Wildlife Service and answer plaintiff's complaint as follows:

Jurisdiction

1. The allegations contained in this paragraph consist of legal conclusions for which no response is required.

Parties and Venue

2. Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in the first sentence of this paragraph and on that basis deny them. The allegations contained in the second sentence of this paragraph are admitted. The allegations contained in the third sentence of this paragraph are conclusions

of law for which no response is required. The allegations contained in the fourth sentence of this paragraph are admitted.

Statement of Facts

3. Federal defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph and on that basis deny them.

4. The allegations contained in the first sentence of this paragraph are admitted. The allegations contained in the second sentence of this paragraph consist of legal conclusions for which no response is required.

5. With regard to the allegations contained in the first sentence of this paragraph, federal defendants admit that on July 7, 1990, the Service issued "Incidental Take Guidelines," which have since been rescinded, and further aver that the guidelines speak for themselves and provide the best evidence of their content. With regard to the allegations contained in the second sentence of this paragraph, federal defendants admit that the Walker Creek Unit is a nest site or activity center as defined in the Guidelines and deny all remaining allegations.

6. With regard to the allegations contained in the first sentence of this paragraph, federal defendants admit that the United States Fish and Wildlife Service rescinded the Incidental Take Guidelines and deny all remaining allegations. The allegations contained in the second sentence of this paragraph are denied. The allegations contained in the third sentence of this paragraph are denied. The allegations contained in the fourth sentence of this paragraph consist of conclusions of law for which no response is required.

7. The allegations contained in the first sentence of this paragraph are admitted. The allegations contained in the remainder of this paragraph purport to characterize the rule

determining critical habitat for the northern spotted owl, which is a document that speaks for itself and provides the best evidence of its content.

8. The allegations contained in this paragraph are admitted.

9. The allegations contained in this paragraph purport to describe the requirements of the Endangered Species Act and its implementing regulations, which speak for themselves and provide the best evidence of their content.

10. Federal defendants are without information or knowledge sufficient to form a basis as to the truth of the allegations contained in this paragraph and on that basis deny them.

11. With regard to the allegations contained in this paragraph, federal defendants admit that the Fish and Wildlife Service still considers the Walker Creek Unit to be an active nesting site and admit that the female owl died before the 1997 nesting season. Federal defendants lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations in this paragraph and on that basis deny them.

12. Federal defendants are without information or knowledge sufficient to form a basis as to the truth of the allegations contained in this paragraph and on that basis deny them.

13. The allegations contained in this paragraph are denied.

14. The allegations contained in the first sentence of this paragraph are admitted. The allegations contained in the second and third sentences of this paragraph purport to characterize the contents of a document that speaks for itself and provides the best evidence of its content. The allegations contained in the fourth sentence of this paragraph consist of legal conclusions for which no response is required.

15. The allegations contained in this paragraph consist of legal conclusions for which no response is required.

16. The allegations contained in this paragraph are admitted.

FIRST CLAIM FOR RELIEF

17. The allegations contained in this paragraph purport to characterize plaintiff's complaint in this case; plaintiff's complaint is a document that speaks for itself and provides the best evidence of its content.

SECOND CLAIM FOR RELIEF

18. The allegations contained in this paragraph purport to describe plaintiff's request for relief in this case. Plaintiff's complaint and request for relief speak for themselves and provide the best evidence of their content.

COUNTERCLAIM

1. The Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, was enacted in 1973 for the express purpose of providing a means of conserving the ecosystems of endangered and threatened species, to provide a program for the conservation of such species, and to take appropriate steps to achieve the purposes of various treaties and conventions regarding wildlife protection as set out in the Act. 16 U.S.C. § 1531(b).

2. An "endangered species" is defined by the Act as any species which is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). A "threatened species" is defined as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20).

3. The ESA provides a means by which the Secretary of the Interior or the Secretary of Commerce may designate by regulation any species as threatened or endangered because of specified factors. 16 U.S.C. §1533(a)(1); *see also* 16 U.S.C. § 1532(15).

4. Without permit or other authorization, it is unlawful for any person to "take" wildlife listed as "endangered" within the United States or its waters. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c). By regulation, the prohibition against the taking of endangered species has been extended to species listed by the Secretary of the Interior as "threatened." 50 C.F.R. § 17.31(a). The taking of a "threatened" species in violation of this regulation is also a prohibited act under the Endangered Species Act. 16 U.S.C. § 1538(a)(1)(G); *see also* 50 C.F.R. § 17.31(a) and 16 U.S.C. § 1533(d).

5. The term "take" is defined by the Act to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such activity. 16 U.S.C. § 1532(19). Regulations promulgated by the Fish and Wildlife Service further define the term "harm" as follows:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification, or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

6. The prohibition against takings applies equally to persons engaged in activities that are not intended or designed to take species listed under the ESA, but may do so incidentally. Incidental takings that do not jeopardize the continued existence of a listed species may be authorized by the Secretary pursuant to an incidental take permit issued under Section 10(a)(1)(B) of the Act. 16 U.S.C. § 1539(a)(1)(B). Activities involving incidental takings must be conducted in accordance with terms and conditions set out in the statement or permit.

7. The northern spotted owl (*Strix occidentalis caurina*) was listed as a threatened species on June 26, 1990; *see also*

50 C.F.R. 17.11(h). Its present range extends from as far north as southwestern British Columbia through western Washington, western Oregon, the coast range area of northwestern California and as far south as the San Francisco Bay. The owl is a nocturnal predator that prefers old-growth forests or forest with old-growth characteristics. 55 Fed. Reg. 26114-26118. Northern spotted owls have relatively large home ranges, and the available data indicate that a pair of owls requires large tracts of land containing significant acreage of old-growth to meet their biological needs. *Id.*

8. The northern spotted owl is threatened throughout its range primarily because of the loss and adverse modification of suitable habitat resulting from timber harvesting.

9. Plaintiff Boise-Cascade is the owner of approximately 50-65 acres of timber in Clatsop County, Oregon, known as the Walker Creek Unit. The Walker Creek Unit contains some of the best old-growth nesting habitat for northern spotted owls in the area. The Walker Creek Unit was used by a pair of northern spotted owls as a nesting site from 1990 to 1996. There is a reasonable likelihood that the site will be used again this spring for nesting by either the Walker Creek male or another owl pair.

10. Defendant United States alleges that the proposed harvest of the Walker Creek Unit by Boise will result in harm to and therefore a take of northern spotted owls occupying this nesting site by significantly modifying and degrading the habitat at the site in violation of Section 9(a)(1)(G) of the ESA, 16 U.S.C. § 1538(a)(1)(G), and 50 C.F.R. § 17.31(a). The government further alleges that this destruction of habitat will lead to the actual death or injury of the owls by significantly impairing their essential behavioral patterns, including breeding, feeding, and sheltering.

PRAYER FOR RELIEF

WHEREFORE, defendant, the United States of America, respectfully requests:

1. That a preliminary injunction issue enjoining plaintiffs from clearing any part or portion of the Walker Creek Unit area pending surveys conducted by the Fish and Wildlife Service or their representatives of the Walker Creek Unit during the upcoming 1998 breeding season (March 1-August 31), with leave to report the need for additional surveys at that time.

2. That final judgment be entered against plaintiff after examination of the survey data referenced above permanently enjoining the company from clearing any part or portion of the Walker Creek Unit until such time as such clearing will not result in a taking of a northern spotted owl or until such time as plaintiff has obtained a permit pursuant to Section 10(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B), permitting an incidental take of northern spotted owls.

3. That the United States be awarded its costs of suit, including attorneys' fees.

Respectfully submitted,

LOIS J. SCHIFFER
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Christiana P. Perry
CHRISTIANA P. PERRY, Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Benjamin Franklin Station
P.O. Box 7369
Washington, D.C. 20044-7369

KRISTINE OLSON—Bar No. 73254
THOMAS C. LEE—Bar No. 76214
Assistant United States Attorney
District of Oregon
600 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902
(503) 727-1000

OF COUNSEL:
Steve Siegel
Department of Interior
Portland, OR

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

1407 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

May 1, 1998

Chambers of
ROBERT E. JONES
United States District Judge

Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Christiana Perry
DEPARTMENT OF JUSTICE
Environmental & Natural Resources Division
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Thomas Lee
UNITED STATES ATTORNEY'S OFFICE
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RE: *Boise Cascade Corp. v. Spear*,
Civil No. 97-1810-JO
LETTER ORDER correcting and clarifying
Opinion and Order
Dated April 1, 1998

Dear Counsel:

As Mr. Chadsey has correctly pointed out, the reference at the bottom of page 16 of my April 1, 1998 Opinion and Order should be to *defendant's* motion for a preliminary injunction.

Plaintiff's main obligation with respect to the surveying is to allow the surveying to proceed without interference. To the extent that defendant legitimately needs access to plaintiff's property to complete its surveying, plaintiff should grant such access. Plaintiff has no other *obligations* to participate in the surveying or to summarize its results, but the court encourages plaintiff to be reasonably cooperative.

The record reflects that surveys such as these have been conducted before, and the court anticipates that the surveying in this case can and will be completed without the court's further involvement. However, as always, if problems develop, please do not hesitate to call me for a speedy and cost-effective resolution.

Sincerely,

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed Oct. 15, 1998]

Case No. 97-1810-JO

BOISE CASCADE CORPORATION,
Plaintiff,

v.

MICHAEL J. SPEAR, REGIONAL DIRECTOR
FOR U.S. FISH & WILDLIFE SERVICE,
Defendant.

DECREE AND JUDGMENT

This matter came on for hearing on defendant's motion for preliminary injunctive relief before the Honorable Robert E. Jones, United States District Judge, to enjoin and restrain plaintiff from logging a tract of timber that it owns in Clatsop County, Oregon, known as the Walker Creek Unit. On April 1, 1998, this Court issued an Opinion and Order granting the preliminary injunction request and staying the case until September 4, 1998, pending surveying. The factual findings and conclusions of law set forth in that order and the attached Factual Findings and Conclusions of Law are incorporated by reference into this decree. On September 15, 1998, this Court held a status conference to evaluate the results of the surveying. On the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter.

Therefore,

IT IS ORDERED AND ADJUDGED that Boise Cascade Corporation, plaintiff herein, its officers, employees and agents, and all those in active concert with them, are hereby permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA. Plaintiff's counterclaim for injunctive and declaratory relief is dismissed.

Dated: October 15, 1998

/s/ Robert E. Jones
HONORABLE ROBERT E. JONES
U.S. District Judge

SUBMITTED BY:

/s/ Samuel D. Rauch
SAMUEL D. RAUCH, III,
Of Attorneys for Defendant

APPENDIX J

Endangered Species

Habitat Conservation Planning Handboók

U.S. FISH AND WILDLIFE SERVICE,

and

NATIONAL MARINE FISHERIES SERVICE.

November 1996

Page 1-7:

Processing an incidental take permit application consists of announcing the HCP and NEPA analysis in the *Federal Register* and making them available for public review and comment; evaluating comments received, if any; conducting a consultation under section 7 of the ESA; and determining whether the HCP meets statutory issuance criteria under section 10(a)(2)(B) of the ESA. These basic steps are required for all HCPs. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved (see sections F.2-F.5 below). Other documents or actions that may be needed depending on the HCP include the Implementing Agreement (Chapter 3, Section B.8), Environmental Action Memorandum, a brief document that provides the Service's record of NEPA compliance for categorically excluded actions (Chapter 6, Section B.2), and legal review of the application package (Chapter 6, Section C.4).

Page 1-9:

* * * *

Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

Consequently, an important guiding principle of the handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplified and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with Federal law.

* * * *

Page 1-14:

The handbook established the following target permit processing requirements for HCPs based on the NEPA action. Although not mandated by law or regulation, these targets are adopted as FWS and NMFS policy and all Service offices are expected to streamline their incidental take permit programs and to meet these targets to the maximum extent practicable.

Permit processing times are defined as the period between receipt of a complete application package, as defined in Chapter 6, Section B.2(b), to the issuance of the incidental take permit, including Federal Register notifications and public comment. The targets do not include any portion of the HCP development phase.

Section 10(a)(1)(B) Permit Application Processing Times:

NCP With EIS . . . . . less than 10 months
HCP With EA . . . . . .3-5 months
Low-effect HCP
(Categorically Excluded) . . .less than 3 months

These targets will apply as maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. However, in many cases it is expected actual processing times will be less than these targets and all FWS and NMFS offices are encouraged to improve on the targets whenever possible.

* * * *

APPENDIX K

[Page vii]

Executive Summary of the Northern Spotted Owl Recovery Plan

Introduction

A recovery plan is called for by the Endangered Species Act to guide the management actions needed to bring a threatened or endangered species to a condition in which it no longer needs special protection of the act. The northern spotted owl (also referred to in the recovery plan as the spotted owl and the owl) was placed on the list of threatened species in June 1990. Since February 1991, a Recovery Team appointed by Secretary of the Interior Manuel Lujan Jr. has been formulating a recovery plan for the spotted owl. This report presents a draft recovery plan for the northern spotted owl for review and comment by the public and government agencies.

The northern spotted owl draft recovery plan provides a comprehensive basis for management actions to be undertaken by forest landowners and wildlife agencies to alleviate conditions threatening the species. Primary actions will be taken by federal land management agencies in the Pacific Northwest – the U.S. Forest Service, the U.S. Bureau of Land Management, and the National Park Service. The U.S. Fish and Wildlife Service will oversee implementation of the plan through its authorities under the Endangered Species Act.

State forest management and wildlife agencies in Oregon, Washington, and California also will take actions that contribute to recovery under the plan. These state agencies have an important role in managing state forests and in

regulating forest practices on private land within their jurisdiction. Contributions from habitat on Indian lands also were considered in formulating the draft plan.

The draft recovery plan was developed following review of the scientific data from previous plans for the spotted owl, particularly the conservation strategy designed by the Interagency Scientific Committee (ISC) (Thomas et al. 1990), and by analyzing the most recent data available on owl populations and their habitat. This biological information was the basis for designing measures to achieve recovery.

[Page viii:]

Secretary of the Interior Lujan also asked that the Recovery Team consider other species and economic effects to the extent allowed by law. The Recovery Team made a substantial effort to determine the status and location of other species that could benefit from actions similar to those needed for owl recovery. Measures that would contribute to recovery of the owl, while also helping other species, were favored in decisions leading to the draft recovery plan.

Previous studies show that protection of sufficient habitat for a viable spotted owl population has substantial economic and social costs because of the reduction in timber harvests. The Recovery Team recognized that, under the Endangered Species Act, it could not consider measures short of achieving recovery for the northern spotted owl, even though such measures might cause significantly less economic and social losses. Instead, the Recovery Team looked for ways to achieve recovery that would cause less reduction in timber harvest and fewer job losses in the timber industry.

Recovery Objective

The objective of the draft recovery plan is to remove the northern spotted owl from the list of threatened species.

The Draft Recovery Plan

The northern spotted owl draft recovery plan has seven key elements:

1. A recovery objective and a set of criteria for determining whether conditions exist that would allow the northern spotted owl to be removed from the list of threatened species.
2. A network of designated conservation areas on federal forestlands, with each area designed to protect owl habitat sufficient to support a number of breeding pairs of owls.
3. A set of guidelines that govern management activities on federal forestlands in designated conservation areas.
4. A set of guidelines that govern management activities on federal forestlands outside of designated conservation areas.
5. A set of suggestions for contributions from nonfederal forestlands to support spotted owl populations.
6. A monitoring and research program that will provide new information on spotted owls and their habitat, and develop and test management techniques for promoting and maintaining owl habitat while allowing appropriate forest management.
7. Implementation mechanisms that provide oversight and coordination, relying primarily on existing authorities and forest management planning procedures.

Each of these elements is described briefly, followed by a discussion of the scientific basis for the plan and of the economic and social considerations built into the plan.

[Page ix:]

Delisting Criteria

The primary threat to the northern spotted owl leading to its designation as a threatened species is the reduction and fragmentation of its habitat in forests in Washington, Oregon, and northern California. Northern spotted owls use old-growth forests and other forests with similar characteristics for nesting, breeding, and rearing young. As timber harvesting has proceeded in the Pacific Northwest, the amount of habitat suitable for spotted owls has declined and remaining habitat areas have become smaller and more isolated from each other, particularly during the last 50 years. As a result, the population of spotted owls declined, in some areas rather sharply.

The objective of the draft recovery plan is to reduce the threats to the spotted owl so that it can be removed from the list of threatened species anywhere in its range. The decision to remove the spotted owl from the list of threatened species can be made on an incremental basis for individual areas, called provinces, or for groups of provinces. The range of the spotted owl has been divided into 11 provinces.

Four criteria must be met before delisting is considered: (1) A scientifically credible plan for monitoring owl populations and owl habitat must have been in effect for at least 8 years; (2) the population must have been stable or increasing, as indicated by both density and demographic estimates, for at least 8 years; (3) regulatory mechanisms or land management commitments must have been implemented that provide for adequate protection of breeding, foraging, and dispersal habitat, and (4) analyses must indicate that the population is unlikely to need protection under the Endangered Species Act during the foreseeable future. The draft recovery plan emphasizes that all of these criteria must be satisfied before delisting is considered.

Designated Conservation Areas

As the primary means for achieving recovery, the draft plan recommends establishing 196 designated conservation areas (DCAs) to provide approximately 7.5 million acres of federal forestland as the primary habitat for the northern spotted owl population. These DCAs include approximately 48 percent of the total remaining spotted owl nesting, roosting, and foraging habitat on federal lands (Figure ES.1.). The largest DCAs are designed to support a population of 20 or more pairs of owls in habitat conditions that allow successful breeding and rearing of young. They are located to allow owls to disperse from one DCA to another. Each DCA contains areas of currently existing owl habitat combined with areas of younger forests. These younger stands will be protected so they can mature into owl habitat. The DCAs contain approximately 1,180 known owl pairs on federal lands. This represents about 48 percent of the total pairs currently known on all federal lands (Figure ES.2.). When the DCAs become fully developed owl habitat, they will support a population of approximately 2,320 pairs of owls.

DCAs are located to take advantage of other forestland containing owl habitat that will not be harvested or will be harvested in a manner that does not reduce habitat value. Such areas include parks, wilderness areas, and certain administratively reserved areas. DCAs also are located in a pattern to reduce the risk to the owl population from natural threats such as fire, disease, and insects.

[Page 3:]

I.

A. The Northern Spotted Owl and the Endangered Species Act

1. How the Owl Came To Be Protected Under the Act

The U.S. Fish and Wildlife Service (FWS) first considered the possibility of listing the northern spotted owl (also referred to in the recovery plan as the spotted owl and the owl) under the Endangered Species Act in the early 1980s, but concluded that it would have been inappropriate. In 1987, a small organization known as GreenWorld, later joined by other environmental groups, petitioned the FWS to list the owl as endangered. The act's petition provisions required a preliminary finding within 90 days as to whether listing might be warranted. The FWS made a positive finding and initiated a review of the owl's status.

A second finding was required within 12 months of receipt of the petition. The second finding, directed at the question of whether listing was warranted, was more definitive than the 90-day finding. On December 17, 1987, the FWS found listing was not warranted.

The legality of the negative finding was challenged in court by several environmental groups, and the federal District Court in Seattle ruled that the finding appeared not to be supported by the status review that the FWS had conducted (see General Accounting Office 1989 for a review). When a judge ordered the FWS to produce a record that supported its decision, the FWS requested and was granted time to reconsider its finding in light of the most recently available information. In April 1989, the FWS made a finding that listing was warranted. A proposal to list the owl as a

threatened species was published in June 1989, and the owl was listed effective July 23, 1990.

2. The Endangered Species Listing Process

A process for ascertaining which species need attention is basic to any program of species conservation. Section 4 of the Endangered Species Act assigns this task to the Secretaries of the Interior and of Commerce, and operational authority within the two departments is delegated to the FWS and the National Marine Fisheries Service. The responsibilities and authorities for listing under the act are framed very broadly as the determination ". . . whether any species is an endangered species or a threatened species . . . ." Determinations are made by regulation through a proposal-and-comment process. In addition to this broad charge to the federal agencies to assess the status of species, the act provides a process for the public to petition for a species to be listed, and it makes the agencies accountable to petitioners. Some definitions are useful in understanding this assessment phase.

"Species" means any species or subspecies of plant or animal and, in the case of vertebrate life forms, may include any distinct population segment.

"Endangered species" means a species in danger of extinction throughout all or a significant portion of its range.

[Page 4:]

"Threatened species" means a species likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

The Endangered Species Act requires that listing decisions be made "solely on the basis of the best scientific and commercial data . . . ." In this context, "commercial data" refers solely to information regarding trade in a species or products derived from it, and does not allow the probable

economic consequences to affect a decision regarding a species' listing.

3. Critical Habitat Designation

The Endangered Species Act also directs the agencies to propose critical habitat "to the maximum extent prudent and determinable." Once again, the act's definitions are important.

"Critical habitats" are specific areas within the geographical area occupied by a species at the time of listing on which are found those physical or biological features (1) essential to the conservation of the species; (2) which may require special management considerations or protection; and (3) specific areas outside the area occupied by the species upon a determination that such areas are essential to its conservation.

"Conservation" means the use of all methods and procedures necessary to bring a species to the point at which the protective measures of the act are no longer necessary. Conservation is the process or means of achieving recovery. It is reasonable for the designation of critical habitat areas "essential to the conservation of the species" to consider the habitat needs identified in a recovery plan.

Designation of critical habitat is considered to be prudent when it would be of conservation benefit to the species for which it is designated. Critical habitat is determinable if sufficient information is available to adequately delineate the area or areas that should be included in the designation.

The act also requires an examination of the economic and other relevant impacts of the designation of critical habitat, and allows areas to be excluded from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would lead to the extinction of the species.

In the proposed and final listing of the northern spotted owl, the FWS deferred designation of critical habitat as "not determinable." Critical habitat must be designated to the maximum extent prudent and determinable at the time a species is listed. If critical habitat is not determinable at listing, the act allows an additional year beyond the one in which listing must progress from proposed to final. At the end of the second year, critical habitat must be designated to the maximum extent prudent. In further consideration of the case that challenged the FWS's original petition finding, the court did not accept the FWS's argument that critical habitat for the owl was not determinable, and ordered the FWS to publish a proposal to designate critical habitat by April 29, 1991. A proposal for 11.6 million acres of critical habitat was published on May 6, 1991. A revised proposal that reduced the area to about 8.2 million acres, principally by excluding private, Indian, and state lands, was published on August 3, 1991, and a final designation of 6.9 million acres was issued on January 15, 1992.

[Page 18:]

Northern goshawks (*Accipiter gentilis*) also prey on adult and juvenile spotted owls (Forsman *et al.* 1984, Gutiérrez et al. 1985, Miller 1989, Johnson 1991 pers. comm.). Nevertheless, spotted owls will nest within a goshawk territory (Forsman *et al.* 1984) and will defend their young against attacks by goshawks (Gutiérrez unpub. data). Thus, goshawks probably are not serious threats to spotted owl populations.

Until recently, people rarely have encountered spotted owls and there has been no historic persecution by humans of this docile creature. The recent, conspicuous rise in spotted owl deaths at the hands of humans is a potential threat to local owl populations.

Diseases and Parasites

Disease and parasite infections represent another form of interspecific interaction because it is the relationship (in the broad biological meaning) of one organism with another. However, the topic of pathogens is treated separately here because it is treated separately in status analyses by the FWS when listing a species as threatened or endangered.

Relatively little is known about the diseases and parasites of spotted owls. Gutierrez (1989) conducted an extensive survey of hematozoan parasites (those that live in the blood) among all three subspecies of the spotted owl. Of the six hematozoan species found, all but one species occurred in the northern spotted owl. The infection rate was 100 percent, which was one of the highest rates of infection by these parasites recorded among birds (Greiner et al. 1975). However, spotted owls must be adapted to carry these high parasite loads because their survival rates are very high where infection rates are high (e.g., northwestern California, see following text). Hoberg *et al.* (1989) examined 20 northern spotted owls for helminth (worm) parasites and found eight species, representing nematodes (round worms), cestodes (flat worms), and acanthocephalans (spiny-headed worms). More than 80 percent of the birds were infected with at least one species; and multiple infections were common. Young *et al.* (In Review) reported two hippoboscid fly (louse) species from spotted owls in northwestern California. One species of fly was recorded only once among the 382 owls examined, but approximately 17 percent of the owls they examined were infested by the other species. Fly densities on owls were higher in years of higher summer and fall temperatures and lower winter precipitation. The authors speculated that low temperatures may have depressed survival of fly pupae. Finally, Forsman (pers. comm.) observed two nests where owlets had such high infestations of hippoboscids that the flies caused severe trauma to the young birds.

Habitat

Habitat selection and its context: Perhaps the most controversial aspect of the natural history of the spotted owl concerns its habitat requirements. Thomas *et al.* (1990:143-144) discussed the complex habitat needs of the northern spotted owl.

Most species exhibit variation in habitat selection (i.e., most species are not strict habitat specialists). Spotted owls are known to use many habitats. Empirical observations of spotted owls in different habitats can provide understanding of the birds' habitat requirements at three different levels (Peek 1986). *Habitat use* is the simple observation of an animal in a habitat without understanding the context of the observation. *Habitat selection* is the choice of a habitat or habitats among those that are directly available to the animal. *Habitat preference* is the selection of habitat that would be made by an animal [Page 19:] if all habitats were available to the animal. Thus, we have many observations of spotted owl habitat use, fewer studies of habitat selection, and no studies of habitat preference as defined by Peek (1986). Early studies portray the northern spotted owl as a denizen of primal forests (Grinnell and Miller 1944) based on observations of habitat use. However, Grinnell and Miller (1944) found that geographic variation in habitat use did exist in spotted owls. Subsequent investigations (Forsman 1976, 1980, Solis 1983, Forsman *et al.* 1984, Gutierrez *et al.* 1984, Solis and Gutierrez 1990, Sisco 1990, Blakesley *et al.* In Press, Bart and Forsman 1992) reaffirmed the naturalists' notions from observations of habitat use, but more importantly, provided analyses of habitat selection. Recent surveys of managed (i.e., previously logged private lands) forests have added to the knowledge of habitat use (Diller 1989, Irwin *et al.* 1989a, 1989b, Kerns 1989, Pious 1989). These latter observations are important, but their ecological significance is enigmatic because, unlike studies conducted

on public land, there is no supporting demographic information. It is essential that more demographic information be gathered to evaluate these populations (see section on spotted owl use of young, managed timberlands).

Variation in habitats used: Spotted owls are known to nest, roost, and feed in a wide variety of habitat types and forest stand conditions throughout their distribution (see discussion of suitable habitat elsewhere in this document). Spotted owls use western hemlock, mixed evergreen, mixed conifer, Douglas-fir, redwood, Douglas-fir/hardwood, evergreen hardwood, ponderosa pine, western red cedar, and other forest types in different parts of their range. Most observations of spotted owl habitat use have been made in areas having a component of old-growth and mature forests (Solis 1983, Forsman *et al.* 1984, LaHaye 1988, Sisco 1990, Ward 1990, Zabel *et al.* In Prep.; see additional summaries in Thomas et al. 1990). However, observations of spotted owls in managed (i.e., previously logged) stands are commonplace (Diller 1989, Kerns 1989, Pious 1989). Studies evaluating habitat selection show owl selection for mature and/or old forest stands with concomitant selection against young stands (Forsman 1980, Solis 1980, Carey et al. 1990, Blakesley *et al.* In Press). Selection for forest stands of intermediate age and size vary among the owls studied.

Nesting habitat: Most northern spotted owl nest sites observed on public lands have been located in old-growth or mature forests (Forsman *et al.* 1984, LaHaye 1988). In addition, the proportion of older seral stage forest surrounding nests has been significantly greater than it was in surrounding random sites in the same area (Meyer et al. 1990, Ripple *et al.* 1991). In areas of private managed forest, particularly in the California Klamath and California Coast physiographic provinces, where some uneven-aged silviculture has occurred or where fast tree growth facilitates rapid habitat development, spotted owls are known to nest in

managed stands, especially if residual old-growth characteristics are present (Forsman et al. 1977, Diller 1989, Pious 1989, Thomas *et al.* 1990; see Appendix B).

Spotted owls do not build their own nests; they depend upon suitable naturally occurring nest sites. In older-age forests, owls tend to nest in broken-top trees and cavities; they use platforms (i.e., abandoned raptor nests, squirrel nests, mistletoe brooms, debris accumulations) less frequently (Forsman *et al.* 1984, LaHaye 1988). In younger forests (i.e., forests less than 150 years old), nests more frequently are found on platforms (LaHaye 1988, Irwin et al. 1989a, Buchanan 1991). In one California study (LaHaye 1988), the proportion of platform nests used by spotted owls increased north to south, but the trend probably is related to the distribution of stand ages in that study rather than latitude.

The presence of suitable nest sites has been hypothesized as one possible basis for the use of old-growth by spotted owls (Forsman et al. 1984). However, owls [Page 20:] also use a variety of nest sites in younger-aged stands. But one critical piece of information should be assessed before this hypothesis can be tested. That is, the relative nesting success of birds using cavities and broken-top sites should be compared to that of birds using the presumably structurally less stable debris platforms. In any event, artificial nest sites probably could be provided for these birds (Madison and Woodbridge pers. comm.). European owls in the genus *Strix* readily use nest boxes (Southern 1970, Saurola 1989). If spotted owls behave in a similar fashion to other *Strix* owls, the availability of nest sites probably is not a critical management problem. However, a critical study of nest-box acceptance by spotted owls has not been conducted.

Several studies have been conducted on the structure of spotted owl nesting habitat (LaHaye 1988, Buchanan 1991, Self and Nelson 1991 pers. comm.). In the two studies that compared nest sites with available habitat, one in unmanaged

forest and the other in managed forest (LaHaye 1988 and Buchanan 1991, respectively), owls nested in forests that differed from what was available to them, suggesting selection by the owls. In general, owls preferentially used forests with greater complexity and structure. Nesting habitat structure reported by Self and Nelson in managed forests (1991 pers. comm.) was strikingly similar to the habitat structure used by foraging spotted owls in unmanaged stands within the same province (Solis 1983).

Roosting habitat: Northern spotted owl roosting habitat has been described by Forsman (1976), Barrows and Barrows (1978), Forsman (1980), Solis (1983), Forsman *et al.* (1984), Chavez-Léon (1989), Sisco (1990), and Blakesley *et al.* (In Press). Roost sites are typically areas of relatively dense vegetation (high canopy closure dominated by large-diameter trees). During the summer these sites are usually cool, shady spots near streams or are on the lower third of slopes (possibly a simple correlation with stream position; Forsman 1976, Solis 1983, Blakesley *et al.* In Press). Spotted owls respond to variation in temperature and exposure by moving within the canopy to find favorable microclimate conditions (Forsman 1976, Barrows and Barrows 1978, Forsman 1980, Barrows 1981, Solis 1983, Forsman *et al.* 1984). The multistoried stand structure of roost sites facilitates this movement. Because of this observed behavioral response to variation in temperature, it has been hypothesized that old-growth forests are necessary to spotted owls for them to avoid heat stress (Barrows and Barrows 1978). However, Gutierrez (1985) pointed out that there are other plausible hypotheses to explain the associated owls with old-growth.

Foraging habitat: Of the major spotted owl habitat categories, feeding habitat appears to be the most variable (summarized in Thomas et al. 1990). This is predictable given the highly variable distribution and abundance patterns of the owl's primary prey (Ward 1990). Within a given

geographic province, foraging habitat may be more variable than either nesting or roosting habitat. Nevertheless, spotted owl foraging habitat is characterized by high canopy closure and complex structure. Comparisons of habitat among unmanaged stands used by foraging owls and managed stands occupied by nesting owls shows a surprising concordance of structural habitat features in California (Appendix B).

Solis and Gutierrez (1990) presented evidence that male and female spotted owls may segregate their foraging habitat. The smaller males appeared to be using stands that had higher tree density than were the larger females, which foraged in less dense habitats. Earhart and Johnson (1970) suggested that differential habitat use by male and female owls may occur because the high wing loading of the females would make them less maneuverable than males. However, this probably would be a consequence rather than a cause of reversed sexual dimorphism (Muller 1986, Solis and Gutierrez 1990).

[Page 51:]

Douglas-fir stands (less than 50 years old). The nearly simultaneous harvesting of large contiguous blocks of industrial-owned lands has created expanses of relatively young forests that isolate the residual suitable habitat and occupied owl sites. Clear-cutting has been the predominant harvest practice within the province.

Few clusters containing more than three pairs of owls exist north of Highway 126. Here, in the northern two-thirds of the province, individual owl sites are generally separated by 3 to more than 15 miles.

Predation and Competition. Great horned owls and northern spotted owls were surveyed in the central Coast Range in 1990 and 1991. Great horned owls were nearly seven times more numerous than spotted owls (Table 2.5).

As great horned owls are key predators on spotted owls, this great relative abundance is of concern. Barred owls are distributed throughout the province and have been recorded at 46 sites from 1980 to 1991. The goshawk population is very low in the Coast Range.

Province Isolation. The province is connected to the western Cascades province in Oregon through forested lands south of Eugene, and to the Klamath and western Cascades provinces south of Canyonville. These key linkage areas contain BLM and private lands in a checkerboard pattern. Due to past and present timber harvest on federal and intervening state and private lands, habitat is particularly limited. For example, BLM lands within 50 percent of the quarter-townships in this area do not contain owl habitat adequate for dispersal (i.e., do not meet the "50-11-40 rule" as described in Thomas et al. 1990). Therefore, the risk of isolation of the Oregon Coast Range province is high and will increase with additional harvest of habitat.

Historically, there was probably a significant connection between the Oregon Coast Range province and the western Washington lowlands province, with owls crossing the Columbia River. Timber harvest since 1920 likely has eliminated this connection. To increase the likelihood of owl recovery in these provinces, habitat would have to be developed along both sides of the Columbia River to reestablish the connection between these two provinces.

Vulnerability to Natural Disturbance. Extensive fires historically have removed large areas of habitat, although return intervals have been long, and annual risk is fairly low. Because current suitable habitat areas are limited and disconnected, disturbance events could remove key areas.

Western Oregon Cascades

This province lies west of the crest of the Cascade Mountains and extends the length of the state from the

Columbia River to the California border. Habitat extends from the eastern edge of the Willamette Valley upslope to about 5,000 feet, and from the moist, true-fir forest in the north to the dry, mixed conifer-pine-oak woodlands in the south. Ownership in this province is 54 percent Forest Service, 34 percent private, 10 percent BLM, and 2 percent state (Figure 2.5a).

Low Populations. Owl populations within this province are moderately high, as is the amount of remaining habitat on federal lands. Areas with low owl numbers occur on 1) private lands, 2) checkerboard BLM lands at lower elevations, 3) checkerboard Forest Service lands in the Santiam Pass area, and 4) higher elevation forests near the Cascade Crest. There are approximately 925 known spotted owl pair sites in this province. Owl use of habitats above 5,000 feet elevation is very limited and few pairs successfully nest above 4,500 feet in this province.

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Filed Dec. 10, 1998]

Civil No. CV '98-1538

BOISE CASCADE CORPORATION,
a Delaware corporation

Plaintiff,

v.

RUSSELL D. PETERSON, STATE SUPERVISOR FOR U.S. FISH AND WILDLIFE SERVICE,

Defendant.

COMPLAINT

Mandamus To Require Defendant To Take Action on Plaintiff's Application for an Incidental Take Permit

Jurisdiction

1. This mandamus proceeding is brought pursuant to the All Writs Act, 28 USCA § 1651(a) (1994) and 28 USCA § 361 (1993).

Parties

2. Plaintiff is a Delaware corporation and the owner of a parcel of commercial timberland in Clatsop County, Oregon, known as the Walker Creek Unit (the "Unit"). Defendant is the Regional Director of the U.S. Fish and Wildlife Service (the "USFWS"), who is charged with the duty and responsibility of enforcing and implementing the provisions of the Endangered Species Act (the "ESA"), 16 USCA § 1531, *et seq.* (1985 & Supp 1998).

Claim for Relief

3. The Unit from 1990 to 1996 was the nesting site for a pair of Northern Spotted Owls. In 1990 the Northern Spotted Owl was listed by the USFWS as a threatened species pursuant to the provisions of the ESA.

4. Before the 1997 nesting season, the female Walker Creek Northern Spotted Owl died and the male Walker Creek Northern Spotted Owl found a new mate at another nesting site. In October 1997 plaintiff sought approval from the Oregon Department of Forestry (the "ODF") to log the Unit. The ODF approved that logging plan, but advised plaintiff that it might be in violation of the ESA if it did not obtain an Incidental Take Permit ("ITP") from the USFWS before logging the Unit.

5. Plaintiff then sought a determination from defendant that an ITP was not required because the Walker Creek Northern Spotted Owls had abandoned the site and, therefore, could no longer be "taken" as a result of plaintiff logging the Unit. After the USFWS failed and refused to tell plaintiff whether an ITP would be required before plaintiff could log the Unit, plaintiff brought suit in this court, *Boise Cascade Corporation v. Michael J. Spear, Regional Director, etc.*, Civil No. 97-1801-JO, seeking a declaratory judgment that the logging of its timber would not result in a violation of the ESA and seeking an injunction barring defendant from enforcing it against plaintiff on account of logging the Unit.

6. Defendant then filed a motion seeking to dismiss that suit on various grounds, including that there was no "case or controversy" within the meaning of Article III of the U.S. Constitution because the USFWS had not threatened plaintiff with either civil or criminal prosecution if it logged the Unit.

7. After an ODF wildlife biologist testified at the hearing on plaintiff's motion for a preliminary injunction that plaintiff's Unit was probably the best Northern Spotted Owl

habitat in the northern part of the Oregon Coast Range, this court gave defendant 10 days in which to file a counterclaim if it wanted to prevent plaintiff from logging its timber. On the tenth day, defendant filed a counterclaim seeking an injunction preventing plaintiff from logging the Unit. This court then granted defendant an injunction barring plaintiff from doing any further logging on the Unit, pending a further order of the court, and it dismissed plaintiff's suit against defendant.

8. After a subadult Northern Spotted Owl was found to have been in the area of the Unit during the 1998 nesting season, this court made its injunction permanent, barring plaintiff from logging the Unit unless it obtained an ITP, pursuant to section 10 of the ESA.

9. After this court issued its initial injunction, plaintiff filed a legal action in the United States Court of Federal Claims alleging that the Unit had been taken by the federal government for a public purpose and seeking just compensation pursuant to the Fifth Amendment.

10. As a defense to that action, the government alleged that plaintiff's takings claim was not "ripe" because it had not sought an ITP from defendant. On November 5, 1998 plaintiff agreed to dismiss its takings action without prejudice and the claims court did so to facilitate the pursuit and completion of plaintiff's administrative remedies.

11. On November 6, 1998 plaintiff submitted to the government a Habitat Conservation Plan (the "HCP") for the Unit, along with an application for an ITP and the appropriate fee.

12. The HCP stated that plaintiff required action on its ITP by not later than December 10, 1998, so that logging could be completed by March 1, 1999.

13. Plaintiff has timber on the Unit that has blown down and will no longer be of merchantable quality if it is not removed within the next few months. To gain access to that timber, plaintiff must be able to log other timber on the Unit. Also, much of the timber in the Unit is overly mature and decaying, thus causing it to lose value and become a safety hazard to persons in the area. Therefore, any delay in approving the ITP will cause plaintiff irreparable harm.

14. Defendant is required to give the public notice of plaintiff's application for an ITP by publication in the Federal Register, which is followed by a 30-day period to allow public review and comment on the HCP, before the USFWS can either grant or deny the ITP.

15. Defendant has failed and refused to publish the required notice in the Federal Register or otherwise take action upon plaintiff's application for an ITP.

WHEREFORE, plaintiff prays for an order of this court requiring defendant to:

1. Publish without further delay notice of plaintiff's application for an ITP;

2. As soon as the period for public review expires, either grant or deny the requested ITP.

DATED: December 10, 1998.

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